

OGC 74-0472

26 March 1974

MEMORANDUM FOR: Mr. Warner

SUBJECT: Restrictions on Use of Telephone Recording
Devices

1. A Federal Communications Commission (FCC) regulation (47 C.F.R. 64.501) prohibits a telephone company from using any recording device to monitor telephone conversations unless the parties to the conversation are given proper notice that the conversation is being recorded. Such notice is required to be given by the use of an automatic tone warning device--the so-called "beep tone"--which is repeated at regular intervals during the course of the conversation. It is also mandatory that no recording device shall be used unless it can be physically connected to and disconnected from the telephone line or switched on and off.

2. To comply with the above regulation, telephone companies have inserted a similar limitation in their tariff schedules, which are filed with the Federal Communications Commission in accordance with 47 U.S.C.A. 203.

3. It seems clear that the burden of meeting the "beep tone" requirement is on the telephone companies rather than on the users, which creates a rather difficult enforcement problem for this reason. If the "beep tone" requirement is violated, a telephone company can be fined up to \$500 for each day of the violation. 47 U.S.C.A. 502. However, the telephone company's only recourse against the subscriber who violates the "beep tone" requirement is to remove the telephone. In practice, the likelihood that a telephone company will take such action against subscribers is very slight. As it was pointed out in OGC 74-0428 dated 8 March 1974, telephone companies are too concerned with First Amendment and monopoly problems since the subscriber has

no alternative to their service. Thus, a subscriber who records a conversation without the "beep tone" runs very little risk. It remains, nonetheless, a violation of the tariff schedules filed by telephone companies with the FCC to record a telephone conversation without the use of the "beep tone."

4. Another means of recording telephone conversations is the so-called induction method where a tape recorder is attached to an induction coil placed against a previously installed telephone. This method also violates the FCC regulation unless a "beep tone" is used.

5. In any event, it has been held that no interception occurs when one party to a telephone conversation simply records it for his own use. Parkhurst v. Kling, 249 F. Supp. 315 (D.C. Pa., 1965). Thus, there is no violation of 47 U.S.C.A. 605 which prohibits the interception and publication of telephone and radio communications without the consent of the parties to the conversation. Likewise, there is no violation of the prescription against the wiretapping contained in the Omnibus Crime Act of 1968 (18 U.S.C.A. 2511, et seq.), since no "interception" takes place when one party to a conversation records it for his own use. Smith v. Cincinnati Post and Times Star, 353 F. Supp. 1126 (S.D. Ohio, 1972), aff'd, 475 F.2d 740 (1973).

6. With regard to the use of a microphone or an amplifier to monitor conversations, it also has been held that no interception occurs when a person places a microphone or a radio transmitter in such a position as to record a telephone conversation, since such listening in in no manner interferes with the transmission of the conversation over the telephone wires. Irvine v. California, 347 U.S. 128 (1954), Silverman v. United States, 365 U.S. 505 (1961), United States v. Borgese, 235 F. Supp. 286 (1964). Moreover, it is certain that a telephone company cannot be held responsible for recordings by these devices since the telephone system is not used. When one looks to the essential purpose of the FCC regulation, however, which is to protect the privacy of telephone communications, attempts to make distinctions between mechanical devices attached to telephones and mechanical devices not attached to telephones is meaningless, if the end result is the same.

7. The Office of Security Duty Office has [redacted] recorders installed in telephones for the primary purpose of recording conversations involving serious threats to Agency installations, senior Agency officials, and national figures. These recorders are, in fact, also used to record any conversation duty officers think is too complicated to record accurately without the aid of a tape. Attached is a memorandum issued by the Office of Security establishing certain procedures for use of these tape recorders.

STATINTL

8. I discussed the above procedure with Mr. Hilbert Schlossberg of the General Counsel's Office at FCC, who advised me that police departments, fire departments, and the like, also record conversations involving threats, safety and related topics. These organizations usually have an agreement with the local telephone company permitting recordation of the conversations without the "beep tone" or any other notice. If the Agency wants to be absolutely safe in this area, we can attempt to reach a similar agreement with C&P. Whether we decide to do so, however, is a matter of policy.

[redacted]

Assistant General Counsel

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Att

JGB:ks

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